12-18-1975

James R. Yocum, Commissioner of Labor and Custodian of the Special Fund v. Walter Campbell, Gwen Don Coals, Inc., Drexel Davis, State Treasurer and Custodian of the Uninsured Employers' Fund and Workmen's Compensation Board of Kentucky

Appellee's Brief 1975-SC-0945

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APPELLEE'S BRIEF

536 SW 2d 470

COURT OF APPEALS OF KENTUCKY

File No. 75-945
W.C.B. No. 1008251

JAMES R. YOCUM, COMMISSIONER
OF LABOR and CUSTODIAN OF THE
SPECIAL FUND ---------- APPELLANT

Vs.

WALTER CAMPBELL, GWEN DON COALS, INC.,
DREXEL DAVIS, STATE TREASURER and
CUSTODIAN OF THE UNINSURED EMPLOYERS'
FUND and WORKMEN'S COMPENSATION BOARD
OF KENTUCKY ---------- APPELLEES

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DON A. WARD, JUDGE

BRIEF FOR APPELLEE

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Pursuant to RCA 1.250, a true copy of this Brief has been served on all parties and the trial judge by mailing same to Hon. M. B. Fields, P. O. Box 601, Hazard, Ky. 41701; Gwen Don Coals, Inc., Hazard, Ky. 41701; Hon. Joe A. Newberg, Department of Labor, Capitol Plaza Tower, Frankfort, Ky. 40601; Hon. Don A. Ward, Judge, Perry Circuit Court, Courthouse, Hazard, Ky. 41701 and Hon. Wm. L. Huffman, Director, Workmen's Compensation Board, Capitol Plaza Tower, Frankfort, Ky. 40601, this 18th day of December, 1975.

Roger P. Elliott
Of Counsel for Appellee, Drexel Davis

TABLE OF CONTENTS
AND AUTHORITIES

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. IS THE UNINSURED EMPLOYERS' FUND LIABLE ONLY TO THE CLAIMANT AND THEN ONLY WHEN THERE HAS BEEN A DEFAULT OF PAYMENT OF COMPENSATION BY THE DEFENDANT-EMPLOYER?

II. DID THE BOARD ERR IN FAILING TO NAME THE UNINSURED EMPLOYERS' FUND IN THE AWARD?

III. ARE TRANSFERS OF FUNDS FROM THE UNINSURED EMPLOYERS' FUND TO THE SPECIAL FUND AN UNNECESSARY DRAIN ON THE BOARD'S ADMINISTRATIVE FUNDS?

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MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE CASE

Plaintiff-Appellee, Walter Campbell, filed an Application for Adjustment of Claim on June 18, 1973, with the Workmen's Compensation Board (hereinafter called "Board"), alleging that he became permanently and totally disabled due to the occupational disease of silicosis and/or pneumoconiosis on April 24, 1973. A hearing was held in Hazard, Kentucky, on November 15, 1973. In as much as this appeal does not concern the factual findings of the Workmen's Compensation Board in this case, it should suffice to

state that the claim proceeded without undue incident to an Opinion, Order and Award by Full Board rendered November 18, 1974. The plaintiff-appellee, Walter Campbell, was found to be permanently and totally disabled and was awarded maximum benefits of Sixty-three ($63.00) Dollars a week for a period of four hundred and twenty-five (425) weeks, said award to be apportioned seventy-five (75%) percent against the Special Fund and twenty-five (25%) percent against the defendant-employer, Gwen Don Coals, Inc., as per KRS 342.316(13) (Record, p. 22-23). It should also be noted that Gwen Don Coals, Inc. (hereinafter called "Gwen Don") did not have workmen's compensation insurance coverage on April 24, 1973.

The Opinion and Award further provided that all sums assessed be paid by the Special Fund, subject to reimbursement by Gwen Don. No liability was assessed against the Uninsured Employers' Fund, nor was said Fund dismissed.

On November 26, 1974, the appellee Uninsured Employers' Fund filed a petition for reconsideration seeking clarification of what its potential liability, if any, would be under the Opinion and Award of November 18, 1974. This petition was overruled by Board Order on December 9, 1974. Subsequently, the Special Fund filed a petition for review appeal in the Perry Circuit Court alleging that the award was improper in that it did not state the extent of liability of the Uninsured Employers' Fund. The Special Fund requested an order from Perry Circuit Court altering the award to make Gwen Don or the Uninsured Employers' Fund liable for that portion of the award not payable by the Special Fund. A similar petition for review was filed in Perry Circuit Court by the Uninsured Employers' Fund and these actions were consolidated on January 27, 1975. (Record, p. 42-43).

On July 18, 1975, the Perry Circuit Court issued an Order and Judgment in these consolidated actions affirming the Opinion and Award of the Board. (Record, p. 49-50). From that Judgment this appeal results.

A R G U M E N T

I.

THE UNINSURED EMPLOYERS' FUND IS LIABLE ONLY TO THE CLAIMANT AND THEN ONLY WHEN THERE HAS BEEN A DEFAULT OF PAYMENT OF COMPENSATION BY THE DEFENDANT-EMPLOYER.

The appellant, Special Fund, asserts that recent decisions of this Court and the Workmen's Compensation Board, the Rules of said Board, and the provisions of KRS Chapter 342 mandate that the Uninsured Employers' Fund shall become liable in the event of default of payment by the defendant-employer. The appellee, Uninsured Employers' Fund respectfully submits that in its commendable attempt to state the law simply, the Special Fund has omitted certain key words and that omission results in an incorrect statement of the law applicable to this case. In actuality the law mandates that the Uninsured Employers' Fund shall become liable to the claimant in the event of default of payments of compensation by the defendant-employer to the claimant. The importance of these additional words is readily apparent when one considers that the appellant is seeking an order from this Court allowing the Special Fund to use the Uninsured Employers' Fund as a collection agency for reimbursement (not compensation) payments which the defendant-employer owes not to the claimant but to the Special Fund itself.

It would indeed be convenient for the Special Fund to have the ability to shift the burden of conserving its own funds onto another state agency, however, in this case the Special Fund seeks to replenish itself, not at the expense of the defendant-employer, but at the expense of the Uninsured Employers' Fund. The Special Fund implies that the Uninsured Employers' Fund can use its statutory subrogation rights to recover from the defendant-employer any amount paid by the Uninsured Employers' Fund to the Special Fund. This is not the case.

KRS 342.760(4) provides:

> "(4) Upon the action taken in subsection (3) of the Uninsured Employers' Fund will become operative, compensation thereafter shall be paid from it when there has been a default in the payment of compensation due to the failure of an employer to secure payment of compensation as provided by this chapter. Such employer shall be liable for payment into the Fund of the amounts authorized to be paid therefrom under the authority of this subsection and for the purposes of enforcing this liability the board, for the benefit of the fund, shall be subrogated to all the rights of the person receiving such compensation."

The wording of this statute leaves no doubt that the only rights to which the Board is subrogated, for the benefit of the Uninsured Employers' Fund, are the rights of the claimant (the person receiving compensation) to compensation which has not been paid. The meaning of KRS 342.760(4) has been recently expounded on by this Court in Drexel Davis V. Shirley Turner, et al, Ky., 519 S.W.2d 820 (1975), which appellant correctly cites on page (2) two of his brief for the proposition that liability on the part of the Uninsured Employers' Fund arises only from a default by the defendant-employer in the payment of compensation due the claimant.

Further, this Court indicated in Davis V. Turner, that the question of liability arising under the subrogation rights of the Uninsured Employers' Fund was a matter which "relates primarily to the rights of the employe". This strongly indicates that only the rights of the claimant against the defendant-employer for nonpayment of compensation due are available to subrogation by the Uninsured Employers' Fund.

In the instant case, any rights of the claimant to compensation have been extinguished by payment of this award from the Special Fund. Therefore, if the Uninsured Employers' Fund is required to reimburse the Special Fund for a debt owed by the defendant-employer, there will be no procedure by which the liability can be transferred back to the party against whom it was originally assessed, Gwen Don.

The appellee Uninsured Employers' Fund respectfully submits that once the award has been paid in full by the Special Fund, subject to partial reimbursement by the defendant-employer, Gwen Don, the collection of that reimbursement becomes a matter of litigation solely between the Special Fund, the Board, and the defendant-employer. The enforcement of an Order of the Board for the benefit of a party, other than to secure payment of compensation to a claimant after default by the defendant-employer, is not the responsibility of the Uninsured Employers' Fund. Therefore, the relief requested by appellant, Special Fund, should be denied as contrary to applicable statutory and case law. In addition, this appeal is not ripe for judicial review inasmuch as there has been no default as yet by the defendant-employer, Gwen Don.

II.

THE BOARD DID NOT ERR IN FAILING TO NAME THE UNINSURED EMPLOYERS' FUND IN THE AWARD.

In conformity with this Court's decision in Davis V. Turner, supra (1975), the Board on remand rendered another Opinion, Order and Award on May 19, 1975, in which it discussed at length the impact of the Court's statements cited in Argument I above. The pertinent portion of that Opinion states as follows:

> "...2. We believe that the Court of Appeals in stating 'we do not concur in the view of the board and the circuit court that the employer has no direct liability to the workman for compensation in such instances, and is liable only to the Fund under its subrogation rights', read in conjunction with the last quoted portion of the opinion, i.e., 'This clearly means that the Fund's liability does not arise merely from the failure of the employer to provide insurance or security but from a default in the payment of compensation due thereto.', requires us to alter the award made originally so as to make said award against the defendant-employer alone. (emphasis added)
>
> "We construed the first above quoted statement of the Court of Appeals to mean that the employer has a direct liability to the workman for compensation, and the second above quoted statement to mean that the Fund's liability does not arise until there occurs a default (our emphasis) in the payment of compensation due.
>
> "It appears that the key words in the Opinion of the Court of Appeals are 'a default (our emphasis) in the payment of compensation due thereto'. Preceding these words by the Court, it was declared that said Court did not concur with the view of the Board and Circuit Court that the liability of the employer to the workman only attached to the Fund under its subrogation rights.
>
> "3. We construe the words '...a default in the payment of compensation due...' as a directive for the payment of compensation to the workman by the Uninsured Employers' Fund only after said injured workman has received an award by the Board against the employer, has proceeded to enforce said award against the employer pursuant to KRS 342.305, and obtained a return of 'no property found' upon the execution upon the judgment.

> After this procedure is followed, there is no doubt in regard to the liability which falls upon the Uninsured Employers' Fund which is subrogated to all the rights of the workman receiving payments from the Fund. This procedure also will adjudicate all future payments due the workman from the employer pursuant to the award and greatly simplify the subrogation rights of the Uninsured Employers' Fund. See Stearns Coal and Lumber Co., v. Duncan, Ky., 113 S.W.2d 436.
>
> "...We have mulled over the words 'a default in the payment of compensation' since this case was handed down and have concluded that the meaning of same, pertaining to the Uninsured Employers' Fund, requires a judgment pursuant to KRS 342.305, execution thereon, and a return of 'no property found', at which time default occurs...".

The holding of this Court in Davis V. Turner, has been recently followed and cited in Drexel Davis, Treasurer V. John Comer, et al, Ky., (Rendered December 12, 1975) again indicating that there is no liability or assertable cause of action against the Uninsured Employers' Fund until an actual default occurs.

The appellee Uninsured Employers' Fund respectfully submits that the Board's interpretation of this Honorable Court's holding is substantially correct. Under the terms and provisions of KRS 342.760(4) and 342.690(2), no liability on the part of the Uninsured Employers' Fund arises unless and until there has been a default in the payment of compensation due and owing to the claimant from the defendant-employer. If such a default occurs, the liability arises not from the original Order and Award, but from a motion brought before the Workmen's Compensation Board by the claimant after he has exhausted all his civil remedies against his defendant employer. This liability arises from the occurance of an actual default and execution of judgment

with a return of no property found. Springing from the statute, as it does, this potential liability can not be avoided by the Uninsured Employers' Fund and therefore, there is no necessity to protect the claimant's rights by naming the Uninsured Employers' Fund in the original award. In fact, since no liability exists until default, the Board acted correctly in not naming the Uninsured Employers' Fund in its original Order, Opinion and Award.

III.

TRANSFER OF FUNDS FROM THE UNINSURED EMPLOYERS' FUND TO THE SPECIAL FUND IS AN UNNECESSARY DRAIN ON THE BOARD'S ADMINISTRATIVE FUNDS.

In addition to the arguments set forth above against the legality and equity of making the Uninsured Employers' Fund the collection agent of the Special Fund, appellee respectfully points out that because of their respective sources of funding, transfer of monies from the Uninsured Employers' Fund to the Special Fund involves more than the bookkeeping entry it requires on the surface.

KRS 342.760 provides that the Uninsured Employers' Fund is funded by transfer of set amounts from the Maintenance Fund. This Maintenance Fund is derived from a levy which is assessed at a fixed rate set by KRS 342.450 and 342.475. Therefore, any assessment against the Uninsured Employers' Fund directly reduces the amount of funds available for the operation of the Board and the administration of the Workmen's Compensation Act of this Commonwealth, by hastening the allocation of further sums from said Maintenance Fund. Should this drain become sizeable, a legislative change in the rate of levy would be the only legal alternative to

diminishing the capacity of the Board to process claims as swiftly as possible. Should this occur those who will suffer are the unfortunate members of the public who have lost their ability to earn a living wage.

In contrast to this problem of limited funds, the Special Fund tax may be supplemented by additional assessments pursuant to KRS 342.122(5) if its monies should prove insufficient at any time. Therefore, good financial policy would dictate that the reimbursement of the Special Fund at the expense of the Uninsured Employers' Fund be denied as a potentially harmful precedent. As pointed out in Argument I above, there no longer exists any rights of the claimant which the Board can be subrogated to for the benefit of the Special Fund to collect from the Uninsured Employers' Fund, the legislative intent of eventually shifting the liability to the defendant-employer can not be fulfilled. The result will be a transfer of funds from the Maintenance Fund to the Special Fund on paper; the employer whose noncompliance with the law caused this transfer will escape liability; and the operating funds of the Board will be unnecessarily reduced.

C O N C L U S I O N

On the basis of the above stated arguments, the appellee Uninsured Employers' Fund respectfully submits that the appellant's allegation that the Uninsured Employers' Fund is liable to the Special Fund for the possible default of the defendant-employer, Gwen Don, in reimbursing the Special Fund is contrary to statutory

and case law, public policy, good financial practice, and further is not yet ripe for judicial review inasmuch as no default on the part of Gwen Don has yet occurred. Therefore, this appeal, as it effects the alleged liability of the Uninsured Employers' Fund to the Special Fund must be dismissed and the judgment of the Perry Circuit Court upholding the original Opinion, Order and Award of November 18, 1974, must be affirmed.

Respectfully submitted,

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